

*Ch. Decisions*, 112. In the exercise of a sound judicial discretion, the Court will not be active in specifically enforcing claims, not under the actual circumstances just between the parties, but will turn them over to another tribunal, where such damages may be awarded as in the estimation of a jury may be reasonable and proper. 2 *Story's Eq.*, sec. 770.

But in this case the plaintiff is not asking the Court to enforce the specific execution of a contract made by the original parties, nor are the defendants attempting to defend themselves against any such claim by proof that the granting of the application would be contrary to the principles of justice. No application is made to the Court for the execution of its extraordinary jurisdiction, when it may or may not interfere, in the exercise of a sound but not unlicensed discretion, and when, freeing itself from those strict rules which usually prevail in the administration of justice, it may look at circumstances which otherwise it would not be at liberty to consider, and ascertain whether the demand made upon it is fair and reasonable in all respects, and act or refuse to act accordingly.

The plaintiff is not here asking the Court to enforce a contract between these parties. He comes before the Court upon a clear and acknowledged title, not founded upon convention, but upon admitted law, and asks the Court to restore to him rights which by the law he is unquestionably entitled to. The defendants meet this demand by setting up a parol contract, which being by parol is void under the statute of frauds, and ask that they may be allowed to take shelter under it, because it has been in part performed. Now, it appears to me that under such circumstances, the defendants should be held to the same clear, definite, and unequivocal proof of the contract set up in the answer as would be required of them, if they, as plaintiffs, were asking for its specific performance. There surely is, in this case, no reason why the rule which requires that the identical contract laid in the bill shall be proved, when the operation of the statute of frauds is sought to be avoided upon the ground of part performance, because, being presented in the answer, the plaintiff is deprived of the opportunity which